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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 294

MYRA PAGE WIREN,
Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MYRA PAGE WIREN,
By OSCAR B. WIREN,
Attorney for Petitioner.

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MAY IT PLEASE THE COURT:

The petition of Myra Page Wiren respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

This is a petition from the decision of the United States Circuit Court of Appeals for the Second Circuit dated May 13, 1942, denying petitioner's motion to recall the mandate and allow a reargument of the appeal on the ground that Judge Martin T. Manton who presided in the United States Circuit Court of Appeals for the Second Circuit on the hearing of said appeal was disqualified, which motion did not involve in any way the ultimate merits of the controversy between the parties.

Such disqualification is predicated on the following facts:

In May 1932 Albert D. Lasker, while a member of the Board of Directors of Paramount Publix Corporation (R. p. 32, fol. 40), one of the principal defendants in this action and which it is not denied was one of the most important clients of the advertising company of Lord & Thomas (R. p. 25—foot) which Mr. Lasker testified in the Louis Levy disbarment proceedings *was owned by him* (R. p. 5), made a loan of $250,000 to Judge Martin T. Manton (testimony on trial of Martin T. Manton) (R. p. 5).

During all of the years from 1931 to 1937, continuously and including the time when petitioner's appeal was pending in the Circuit Court of Appeals in 1934, Mr. Lasker handled all of the advertising business of Paramount Publix Corporation (at present Paramount Pictures, Inc.) with all of its subsidiary production, theatre chain and other enterprise companies (R. p. 25—foot). This involved a very large amount of money annually and Paramount was one of Mr. Lasker's most important clients. The business was actually handled by the advertising company of Lord & Thomas but Mr. Lasker testified as stated that *he owned Lord & Thomas.*

In 1926 Paramount Publix Corporation had taken over Mr. Lasker's entire chain of de luxe Chicago theatres, and the financial sheet of the New York Times for Oct. 31, 1931 (R. fol. 20), recorded that Mr. Lasker was buying heavily into Paramount, and that he had been selected as a director of the company.

Paramount refused to allow petitioner to examine the stock lists of the company (R. p. 50) which petitioner is informed and believes would show large stock holdings by Mr. Lasker in the name of some nominee, just as it was proved on the trial of Judge Manton that the quarter of a million dollar loan by Mr. Lasker to Judge Manton was

not made in Mr. Lasker's name but in the name of his company. Paramount states that it has no stock lists for the period in question and sets forth merely an affidavit of an officer to the effect that during a time prior to the period in question Mr. Lasker held only a small amount of stock in his own name and that it was after the commencement of the equity re-organization proceedings of Paramount that Mr. Lasker resigned as director.

While the appeal of the petitioner's case was pending before the United States Circuit Court of Appeals, and prior to the decision thereof, Mr. Lasker was pressing Judge Manton for repayment of said loan (testimony of Mr. Lasker on the Louis Levy disbarment proceedings) (R. p. 5) which repayment Judge Manton was unable to make (testimony on the trial of Martin T. Manton and set forth in the petition of U. S. Attorney Cahill in the disbarment proceedings) (R. p. 5), and with this loan still owing, and Judge Manton, being pressed, and unable to pay, in May 1934, the Circuit Court of Appeals (Judge Manton presiding, with Judges Swan and Chase) decided petitioner's case against the petitioner and in favor of Mr. Lasker's principal client Paramount Publix Corporation, and no part of the loan of $250,000 has been paid, nor any interest thereon, *and yet* Judge Manton did not list this loan among his debts.

While petitioner's appeal was pending before Judge Manton, William J. Fallon, who, as it was testified to, made the contacts and arrangements for the sale of Judge Manton's decisions, was owner of a large theatre ticket concern known as Tysons and well acquainted with the people of the theatrical and moving picture industry. Petitioner's case is for plagiarism, involving as admitted by defendants, a very successful play and motion picture with profits of several million dollars. Within a few months after Judge Manton decided petitioner's case, his financial status was miraculously rejuvenated to the extent of a million and a quarter dollars, as is shown from the following

facts: He testified at the U. S. Bank examination a few months before he decided petitioner's case in 1934, that all of his companies were insolvent and that his liabilities amounted to $750,000, but in May 1935 he made a sworn statement that all of his liabilities had been taken care of and that he was worth a half million dollars net, and still the $250,000 loan from Mr. Lasker was not and has never been paid nor any interest thereon (testimony on Judge Manton's trial, pages 671-686) (R. p. 7).

In answer to the government's questions concerning the large amounts of money that Judge Manton said came to his chambers during the time the petitioner's appeal was pending before him, he testified that $25,000 was brought to him by a "Robert Newman" whom he identified only as "a man in the theatrical business" and to whom no security was given. (Pages 748 and 749 of the record of Judge Manton's trial) (R. p. 7).

As evidence of Judge Manton's indebtedness to the motion picture industry generally, he testified that in September of 1933, after two cases (*Cinema Patents Co. Inc.* v. *Warner Brothers,* and *Cinema Patents Co. Inc.* v. *Duplex Motion Picture Industries, Inc.*) had been argued before him and Judges Swan and Chase, he went to the office of Harry Warner and obtained $50,000, and the next day the court affirmed the decision of the District Court against the plaintiff Cinema Patents Co. Inc. (Vol. 2, pages 787-790, Record of Judge Manton's trial) (R. p. 6).

The Circuit Court of Appeals which heard and decided the appeal in petitioner's case, consisted of Martin T. Manton, as presiding judge, and Judges Thomas W. Swan and Harrie B. Chase, and

The Circuit Court of Appeals which heard this motion of petitioner for a reargument of the appeal, consisted of Thomas W. Swan as presiding judge and Judges Charles E. Clark and Jerome F. Frank.

B

Petitioner respectfully urges that a writ of certiorari be allowed for the following reasons:

1. Because the Circuit Court of Appeals for the Second Circuit has, in denying a re-argument of the appeal, decided an important question of general law in a way untenable and in conflict with the weight of authority.

2. Because the Circuit Court of Appeals for the Second Circuit in denying a re-argument of the appeal, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE your PETITIONER RESPECTFULLY PRAYS that a writ of certiorari be issued out of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the records and all proceedings in this case, and that the order of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

MYRA PAGE WIREN,
Petitioner.

OSCAR B. WIREN,
Attorney for Petitioner.

IN THE

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Respondents.

BRIEF IN SUPPORT OF PETITION

I

Jurisdiction

1. The final order on the decision to be reviewed was entered on May 13, 1942.

2. It is respectfully submitted that the jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; 43 Stats. 938; 28 U. S. C. A. 347.

II

Statement of the Case

A statement appears under heading "A" in the Petition and in the interest of brevity is not repeated here.

III

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred in finding and holding that Judge Manton was not disqualified to hear this appeal.

IV

ARGUMENT

Summary of the Argument

A

The decision of the Circuit Court of Appeals that the facts set forth by petitioner on this motion showing financial consideration to Judge Manton for his decision in this case did not constitute disqualification is erroneous and contrary to the established principles of law and the court has decided an important question of general law which is untenable and in conflict with the weight of authority and has departed so far from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

B

Cases in which the opinion of the Circuit Court of Appeals has been unanimous have been reopened because of Judge Manton's disqualification. The present case was affirmed without opinion.

C

The fact that the decision of the Circuit Court of Appeals was an affirmation of the decision of the District Court is not a bar to the granting of a reargument of the appeal.

D

The petitioner is not guilty of laches.

E

The voluminous discussion of substantive facts contained in the answering affidavit in opposition have nothing to do with the issues involved on this motion.

F

The petitioner is not enjoined by the order of the District Court in the bankruptcy proceedings.

POINT I

With Respect to "A" of the Summary of the Argument

The evidence that financial consideration was flowing to Judge Manton in this case is overwhelming.

The answering affidavits do not even attempt to deny, but admit, that Mr. Lasker had and controlled all of the advertising business of Paramount Publix Corporation (later Paramount Pictures, Inc.) from 1931 to 1937 which included the time when the petitioner's appeal was pending, heard and decided in the Circuit Court of Appeals (R. p. 25—foot). Mr. Lasker's advertising company of Lord & Thomas with New York and Chicago offices, which he testified he owned entirely as shown above, had as one of its chief enterprises the business of Paramount and its many subsidiary companies including production, enterprise and chain theatre companies.

The answering affidavits do not deny that Mr. Lasker's entire chain of de luxe Chicago theatres was taken over by Paramount in 1926 or that it was recorded in the New York Times for October 31, 1931 on its financial sheet on page 25 (R. fol. 20), that Mr. Lasker was buying heavily into Paramount and that he had been chosen as a director

of the company, which office it is admitted that he continued to hold until after the commencement of the equity reorganization proceedings of Paramount in 1933 (R. p. 32).

The answering affidavits do not deny, but admit, that Paramount has refused to allow petitioner to examine the lists of stockholders of Paramount (R. p. 50), submitting merely affidavits by an officer of Paramount that Mr. Lasker, at a time prior to the period in question, held only a few shares in his own name, although petitioner claims that, just as the $250,000 loan by Mr. Lasker to Judge Manton was not made in Mr. Lasker's own name but in the name of a company owned by him, so his stock would be held in the name of a nominee. The only attempt of Paramount to answer this contention is the affidavit of an officer of Paramount that Mr. Lasker *personally* in his *own name* held very little stock, without attempting to deny petitioner's contention that Mr. Lasker held stock in the name of a nominee and in spite of the contention that Paramount should supply an affidavit by Mr. Lasker on this matter as Mr. Lasker was available in New York City at the time of this motion and a proper person to give such information (R. p. 43). Paramount's inadequate affidavit therefore is of no significance and palpably intended to mislead the court.

There is not the slightest reason for such refusal to examine the stock lists except the obvious fact *that an examination of the said stock lists would disclose the ownership of such stock by some nominee of Mr. Lasker.* This conclusion is rendered inevitable by the fact that the defendants' own affidavits do not deny that some other nominee owned such stock; their denial is limited to the bald assertion that Mr. Lasker himself in the period in question was not a stockholder of record except to the extent of a few shares. The supplementary affidavit of Mr. Louis Phillips, attorney for Paramount, in an attempt to support his con-

tention, states that he has had the stock lists searched for the period from April 4, 1932 to May 10, 1935 inclusive and that they do not show any ownership by Lord & Thomas (R. p. 50) but the affidavit of Norman Collyer, Assistant Secretary of Paramount states, in contradiction to this, that there were no lists kept between April 4, 1932 and May 10, 1935 (R. pp. 51-52). It is not denied by either of them that Mr. Lasker held stock in the name of some other nominee, for which petitioner wishes to make the search. The report of the financial department of the New York Times for October 31, 1931 (R. fol. 20), handed up by petitioner to the Circuit Court of Appeals at the argument, sets forth that "advertising officials buy heavily into Paramount"—and that also Mr. Lasker was being made a director, and that "Mr. Hertz had purchased a large amount of the stock of the Company in the open marked in company with Mr. Wrigley *and Mr. Lasker*". (Italics ours.)

It is palpable that defendants sought to convey that Mr. Lasker, directly or indirectly, owned merely a few shares of Paramount stock; otherwise their affidavits in this regard would have no significance whatsoever. Yet, as above stated, they failed to produce an affidavit by Mr. Lasker *as to his actual beneficial holdings* of such stock; they fail to deny that Mr. Lasker held stock *in the name of a nominee,* and *they thwart the petitioner's efforts to ascertain the actual facts in this regard by an examination of the very stock lists to which they themselves* have referred.

It is admitted that Paramount had expended large sums of money in preparing to make the picture and that, during the time that petitioner's suit was pending, Mr. Lasker was a director of Paramount (R. p. 32) in addition to handling all of its advertising business (R. p. 25—foot) but their contention is that, after the commencement of petitioner's suit, Paramount (as also Shuberts) went into bankruptcy, and that thereafter Mr. Lasker ceased to be a director. But

they do not deny, on the contrary, they *admit that right on through the bankruptcy proceedings and until 1937* (R. p. 25—foot) (long after the decision of petitioner's appeal by Judge Manton in 1934), *Mr. Lasker continued to handle all of the advertising business of Paramount, with its many subsidiary companies,* which involved a very large amount of money annually. Notwithstanding this, Paramount would try to have it believed that Mr. Lasker did not have much financial interest in Paramount while petitioner's appeal was pending before Judge Manton and when he decided it in Paramount's favor.

The answering affidavits do not deny that from this man who was so deeply involved financially in the affairs of Paramount Publix Corporation and all of its production and theatre chain companies, in New York, Chicago and elsewhere, Judge Manton borrowed a quarter of a million dollars.

The answering affidavits do not deny that while the petitioner's case was pending before Judge Manton, Mr. Lasker was pressing Judge Manton for repayment of this large loan which Judge Manton was unable to pay (R. p. 5).

Then Judge Manton, while thus inextricably bound to Mr. Lasker and his interests in Paramount, decided petitioner's case in favor of Paramount.

Thereafter Judge Manton was not pressed for payment and no part of said loan of $250,000 has ever been paid or any interest thereon. Yet Judge Manton, in 1935, when examined under oath by the Bank of United States, did not list that $250,000 as one of his debts (R. p. 5).

The answering affidavits do not deny that Judge Manton's agent Fallon was an important factor in and closely identified with the motion picture and theatrical business during the time that petitioner's appeal was pending, and Judge Manton admitted an increase in his financial condition to the extent of a million and a quarter dollars within a few months after deciding petitioner's case involv-

ing a very successful play and motion picture which Paramount does not deny made several million dollars, and he did not give the government any explanation aside from such statements as to thousands of dollars being brought to him by a man in the theatrical business whom he only vaguely identified (R. p. 7).

Petitioner respectfully submits that Judge Manton did not decide petitioner's appeal on the merits and that his decision was improperly influenced by financial consideration, and, furthermore, that Judge Manton was not free to decide fairly and impartially, without prejudice or bias, a very important case against Paramount and these defendants involving several millions of dollars; that he was not qualified to preside over the court which was hearing this case; that petitioner's case was not heard by a disinterested court; that in legal effect no hearing was had by petitioner; that the Circuit Court of Appeals was not properly constituted at the time that it heard the petitioner's case, and that the decision and decree of said Court were, by virtue thereof, void in their inception.

It has been held that no decree was rendered by a duly constituted and completely disinterested court and that, in legal effect, no hearing was had by the plaintiff, and that therefore the decrees were void and a nullity, *even in many cases where there was merely technical disqualification and there had been no actual corrupt participation in the decision.* (See *Case* v. *Hoffman,* 100 Wis. 314; *People* v. *Connor,* 142 N. Y. 130; *Duryea* v. *Traphagen,* 84 N. Y. 652; *Seaward* v. *Tasker,* 143 N. Y. S. 257; *Davis* v. *Seaward,* 85 Misc. 210, affd. 171 A. D. 963; *Regina* v. *Henley* (1892) 1 Q. B. 504; *Reg.* v. *Justices of Hertfordshire* (1845) 6 Q. B. 753; *Reg.* v. *Cheltenham* (1841) 1 Q. B. 467.)

The importance of maintaining a fair and impartial judiciary, free from the slightest shadow or question, is recognized by the Judicial Code, Sec. 21 (36 Stat. at L. 1090, Chap. 231, U. S. C. Title 28, Sec. 25), which provides

for the disqualification of a district court judge, and this was invoked by this Court in *Berger* v. *United States*, 255 U. S. 22, 41 S. C. R. 230.

As Judge Knox said in the Levy disbarment proceedings in connection with the Manton affair: "A trained lawyer that he is he should have known that Judge Manton's mind would be warped and biased by such a loan". And "Don't you think it is only human nature for a person on whose behalf money has been spent, to have a feeling of gratitude and even obligation? * * * It might affect a judge's judgment * * *".

POINT II

Cases in which the opinion of the Circuit Court of Appeals has been unanimous have been reopened because of Judge Manton's disqualification. The present case was affirmed without opinion.

In two cases which have been re-opened by the Circuit Court of Appeals on the ground that it was reasonable to believe that there was corruption between Judge Manton and the defendants, namely, *Electric Auto Lite* v. *H. & D. Manufacturing Co.* (109 Fed. Rep. (2nd) 566), and *The Matter of 671 Prospect Ave. Holding Corporation, Bankrupt* (105 Fed. Rep. (2nd) 960), the decisions of that court had been unanimous. (97 Fed. Rep. (2nd) 513) and (78 Fed. Rep. (2nd) 700.) In those cases the Court wrote an opinion, whereas in the petitioner's case it was affirmed without opinion.

POINT III

The fact that the decision of the Circuit Court of Appeals was an affirmation of the decision of the District Court is not a bar to the granting of a reargument of the appeal.

In cases in which Judge Manton has admitted that he sold his decisions (*Cinema Patents Co. Inc.* v. *Warner Bros. Pictures Inc.*, and *Cinema Patents Co. Inc.* v. *Duplex Motion Pictures Industries, Inc.*, supra) his decisions (with Judges Swan and Chase) were unanimous affirmations of decisions by the lower court dismissing the complaints (66 Fed. (2nd) 744).

POINT IV

The petitioner is not guilty of laches.

It is respectfully submitted that, under all the circumstances hereinafter set forth, petitioner acted with all diligence in making the motion for a reargument of the appeal. The reasons that the motion was not made before are as follows: When petitioner learned, after the trial of Judge Manton, of the facts as to Judge Manton's great financial obligations to Mr. Lasker and to the motion picture industry, the petitioner had been, and was for a long time thereafter, very dangerously ill with heart trouble, having been confined in a hospital for months and for months after leaving the hospital she was in the care of trained nurses, and the doctors had said that she could not live, all due in large measure to the strain, suffering and anguish caused by the theft of her literary work, the subject of this lawsuit, and the long and difficult struggle which she went through in trying to have her day in court (R. pp. 3, 4, 46). The petitioner is the sister of the attorney herein, and during her very long and serious illness he was prevented in many ways from giving his attention to this case. As the petitioner was so ill it did not seem useful at that time to commence proceedings for a rehearing, and he felt that any time, money and effort that he could expend, he should devote in trying in every way he could to aid his sister's recovery. He even found it necessary to accompany the petitioner to Switzerland where she had been under the care

of Swiss physicians that she might try to regain her health. As soon, however, as there was expectation of her recovery, a start was made to secure evidence, and he obtained information which convinced him, and others with whom he consulted, that with proper investigation specific evidence could be secured proving corruption with respect to Judge Manton's decision in this case. Thereafter, petitioner's counsel conducted extensive investigations and employed assistants to obtain such evidence. In addition to the facts set forth in the affidavit in support of the motion, he finally succeeded in obtaining information as to persons who, he was informed, had knowledge concerning and can testify as to additional evidence of payments to Judge Manton, for which he had been diligently seeking, and he requested the court for subpoenas for the examination of certain persons and records (R. p. 12) but this request was not acted upon by the court. Petitioner respectfully submits that evidence of this kind is not easily obtainable and that it necessarily took much time, effort and expense, and that petitioner and her counsel have been just as diligent as it was possible to be under all of the circumstances.

The petitioner was compelled to return from Europe in the Fall of 1939 because of the outbreak of the war and it was necessary for her counsel to see the State Department in Washington and have them cable for passage home for her and for special accommodations because of her condition and the steamship company cabled also. The petitioner's illness lasted from 1935 to last Fall—1941. As late as last September, her heart condition was so bad and she was in such a state of collapse that when a physician was called he advised immediate hospitalization. With treatment and rest she finally has improved (R. pp. 3, 4, 46).

POINT V

The voluminous discussion of substantive facts of the plagiarism suit contained in the answering affidavit in opposition have nothing to do with the issues involved on this motion.

The answering affidavits of defendants contain a voluminous discussion of the substantive facts in this litigation as well as various proceedings therein. Many of said statements are contrary to the fact, but, it is respectfully submitted that the sole issue involved in this proceeding is the question of Judge Manton's disqualification.

POINT VI

The petitioner is not enjoined by the order of the District Court in the bankruptcy proceedings.

Paramount, in its opposing affidavit, resorts to a long argument trying to show that this motion is enjoined by the restraining order in bankruptcy of the District Court. The Circuit Court of Appeals, in denying this motion, did not refer to this contention of Paramount. The order in bankruptcy does not apply to this case for the reason that this case, among others pending at the time of the bankruptcy, was specifically excluded from the operation of the restraining order by an order of Judge Alfred C. Coxe which modified the restraining order and provided that this action should "continue to final judgment". (R. p. 47.) A similar order was signed in the Shubert bankruptcy proceedings by Judge Francis G. Coffey (R. p. 47). The order of June 16, 1934, mentioned by Paramount, was issued *after* the argument and decision by Judge Manton of the appeal to the Circuit Court of Appeals.

CONCLUSION

Petitioner merely asks that her appeal be heard by a clearly disinterested Court—the most fundamental right to which every litigant is entitled.

It is therefore respectfully submitted that this case calls for the exercise by this Court of its supervisory powers, and that to such an end, a Writ of Certiorari should be granted and this court should review the decision by the Circuit Court of Appeals for the Second Circuit and vacate the same.

MYRA PAGE WIREN,

By OSCAR B. WIREN,
Attorney for Petitioner.

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Respondents.

BRIEF FOR RESPONDENT PARAMOUNT PICTURES INC. (sued herein as Paramount Famous Lasky Corporation) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

AUSTIN C. KEOUGH,
Attorney for Respondent Paramount.

LOUIS PHILLIPS,
Of Counsel.

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BRIEF FOR RESPONDENT PARAMOUNT PICTURES INC. (sued herein as Paramount Famous Lasky Corporation) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

On April 4, 1931, petitioner commenced this action to enjoin the respondents from presenting, producing or distributing the play or motion picture photoplay entitled "Death Takes a Holiday", upon the ground that said play was a plagiarism of the petitioner's work "Most". The suit was brought after the respondents' play had been publicly performed for more than a year, and six months after Paramount Famous Lasky Corporation (now Paramount Pictures Inc. and hereafter referred to as "Paramount") had purchased the motion picture rights thereto.

On July 7, 1933, the respondent made a motion in the United States District Court for the Southern District of New York to dismiss the bill of complaint upon the ground that it affirmatively appeared from a reading of the petitioner's work "Most" and her own English translation

of respondents' work, both of which were annexed to the complaint, that there was no plagiarism.

On August 24, 1933, the District Court (Goddard, *J.*) granted the respondents' motion to dismiss the complaint upon the grounds stated in a long and well-considered opinion (5 Fed. Supp. 358), and a decree thereon was entered on October 31, 1933.

On May 21, 1934, the decree was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (Manton, Swan and Chase, *CJJ.*), without opinion (70 F. (2d) 1023).

On October 8, 1934, the petitioner's application for a writ of certiorari was denied by this Court (293 U. S. 591). A rehearing of the petition was denied by this Court on November 5, 1934 (293 U. S. 631) (Record, pp. 17, 54-55).

The record thus establishes that the petitioner's suit is one in which neither the District Court, the Circuit Court of Appeals, nor the United States Supreme Court found any merit.

While the action was pending, receivers in equity were appointed for Paramount (Record, p. 51). The receivership proceedings were superseded by Paramount's adjudication as a bankrupt on March 14, 1933. Between that date and July 1, 1935, the affairs of Paramount were administered by Charles D. Hilles, Eugene W. Leake and Charles E. Richardson, as Trustees in Bankruptcy and as Trustees in Reorganization Proceedings under Section 77-B of the Bankruptcy Act. During this entire period, and while the case was decided by the District Court, affirmed by the Circuit Court and considered by this Court, said

Trustees were in active and complete charge of the business and affairs of Paramount (Record, pp. 29-30, 39-40).

The time for filing claims in the bankruptcy proceedings and the subsequent reorganization proceedings expired prior to June 17, 1935 (Record, p. 30), but the petitioner failed to file any claim therein (Record, p. 31).

Former Judge Manton was indicted on April 26, 1939. He was tried and convicted on June 3, 1939. The proceedings of the trial and the items of his misconduct were the subject of widespread comment in the newspapers. The judgment of conviction was affirmed by the Circuit Court of Appeals (*U. S.* v. *Manton, et al.*, 107 Fed. (2d) 834), December 4, 1939. Certiorari was denied by the United States Supreme Court (309 U. S. 664) on February 26, 1940 (Record, pp. 28, 56).

On April 20, 1942, petitioner served motion papers for a reargument of the appeal decided on May 21, 1934 by the Circuit Court of Appeals, alleging that Judge Manton was disqualified to hear the original appeal. The Circuit Court of Appeals (Swan, Clark and Frank, *CJJ.*) denied the motion upon the grounds set forth in an opinion which is made part of the Record herein (p. 2).

SUMMARY OF RESPONDENT PARAMOUNT'S ARGUMENT

1. The Circuit Court of Appeals properly held that the alleged disqualification of Judge Manton was not established and that Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton.

2. There is no important question of Federal law involved, nor has the Circuit Court of Appeals departed from the accepted course of judicial proceedings.

3. The petitioner is guilty of laches, and the court properly found that her delay in making her application was not adequately explained.

4. Petitioner having failed to file a claim in the Paramount Reorganization Proceedings may now assert no further claim. She is enjoined by order of the District Court of the United States for the Southern District of New York from proceeding in this action.

POINT I.

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE ALLEGED DISQUALIFICATION OF JUDGE MANTON WAS NOT ESTABLISHED AND THAT MR. LASKER'S INTEREST IN PARAMOUNT WAS TOO REMOTE TO IMPLICATE JUDGE MANTON.

Petitioner's sole ground for this application is set forth in Point I of her brief. Briefly it is that Judge Manton at the time he participated in the determination of the appeal of this case was indebted in the sum of $250,000 to one Albert D. Lasker. The petitioner claims that Mr. Lasker:

(a) was an important member of the Board of Directors of Paramount;

(b) owned Lord & Thomas, which handled the advertising for Paramount;

(c) was a substantial stockholder of Paramount; and

(d) in 1926 sold to Paramount his chain of Chicago theatres.

It is also claimed by the petitioner in vague fashion that one William J. Fallon, alleged to have been the agent of

Judge Manton, was the owner of a large theatre ticket agency known as "Tyson's", and that Judge Manton was indebted to the motion picture industry generally by reason of certain dealings with one Harry Warner. Neither Mr. Fallon nor Mr. Harry Warner is alleged to have had any connection with any of the respondents.

These are the tenuous links by which the petitioner seeks to establish a corrupt relationship between Judge Manton and the respondent Paramount.

Remoteness of Mr. Lasker's Interests In Paramount.

The answering affidavits of the respondent Paramount completely refute all of petitioner's claims that the affirmance by the Circuit Court of Appeals of Judge Goddard's decision dismissing the complaint was in any way influenced by Albert D. Lasker, or by any connection which Lasker might have had with Paramount.

The Circuit Court of Appeals properly denied petitioner's application for reargument of the appeal upon the ground that "Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton". This finding is based upon the facts set forth in the respondent's affidavits establishing the following:

1. Mr. Lasker was elected a Director of Paramount on November 9, 1931 and resigned January 17, 1933. During that entire period he attended only one meeting held on March 18, 1932, apart from which he had nothing whatsoever to do with the affairs or the management of the corporation (Record, pp. 25-26, 32-33, 40).

Accordingly, the Circuit Court of Appeals properly found that Mr. Lasker "was not a Director of Paramount when this appeal was heard" (See Opinion, Record, p. 2).

Indeed, Mr. Lasker ceased to be a Director six months prior to respondent's motion to dismiss the complaint made on July 7, 1933.

2. Mr. Lasker owned 33 shares of the common stock of the respondent Paramount out of a total of three million shares issued and outstanding, according to the stock lists of April 4, 1932 and May 10, 1935 (Record, p. 39).

While the petitioner made vague charges that Mr. Lasker may have held a beneficial stock interest through other nominees, she failed to specify any such possible nominee other than Lord & Thomas. The lists of stockholders of Paramount as of record on March 6, 1931, April 4, 1932 and May 10, 1935 disclosed that Lord & Thomas was not a stockholder during that period (Record, pp. 51, 49-50).

3. It is not denied that the respondent Paramount was a client of the advertising firm of Lord & Thomas from June 29, 1932 to May 1, 1937. But this was the sole relationship between them (Record, pp. 25-26).

4. It is admitted that in 1926 the respondent Paramount acquired a large part of the common stock of Balaban & Katz Corporation, a subsidiary of Paramount operating theatres in Chicago (Record, p. 39). Whether any part of this stock was acquired from Mr. Lasker in 1926 certainly could have no bearing upon the alleged disqualification of Judge Manton in considering an appeal in the year 1934.

Mr. Lasker's Alleged Relationship With Judge Manton Not Connected With Paramount.

While it may be true that Judge Manton was heavily indebted to Mr. Lasker, of which Paramount is ignorant,

the petitioner failed to show that this relationship had any connection with Paramount or with the case on appeal.

The petitioner did not even show that Mr. Lasker had any knowledge of the pendency of this action. On the contrary, the record affirmatively establishes that neither Mr. Louis Phillips, the attorney in charge of this case from its inception, nor Mr. Austin C. Keough, the attorney of record and General Counsel for the respondent Paramount, ever discussed this case with Mr. Lasker. Mr. Phillips never met Mr. Lasker (Record, p. 25), and Mr. Keough never spoke to Mr. Lasker (Record, p. 32). Nor has petitioner attempted to show that Judge Manton had any knowledge of Mr. Lasker's alleged interests in Paramount.

The business and affairs of the respondent Paramount were being administered by Trustees in Bankruptcy when Judge Goddard granted the respondent's motion to dismiss the complaint and when his decision was affirmed by the Circuit Court of Appeals. Despite the recklessness of her charges, petitioner does not even dare to suggest any improper connection between Judge Manton and the Trustees or between Mr. Lasker and the Trustees.

Assuming, *arguendo,* that a corrupt relationship existed between Judge Manton and Mr. Lasker, the record is barren of any vestige of evidence that this relationship had any bearing on Judge Manton's participation in a decision affecting the estate in bankruptcy of Paramount.

The Circuit Court of Appeals properly ruled that the "disqualification must be directly connected with the case on appeal" (See Record, p. 2).

POINT II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED, NOR HAS THE CIRCUIT COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

The Circuit Court of Appeals was fully justified in concluding that the appeal was heard "by a qualified court and was correctly decided". The issue presented was purely one of fact, namely, the alleged disqualification of Judge Manton to hear the appeal in this case by reason of his asserted indebtedness to Mr. Lasker. The Circuit Court of Appeals resolved this question of fact in favor of the respondent Paramount, holding that Mr. Lasker's interest was too remote to implicate Judge Manton. In doing so, it followed its prior rulings that disqualification in order to warrant reopening of a case must be directly connected with it.

The Circuit Court of Appeals considered the petitioner's application and denied it in the same fashion and for the same reasons that it has denied other applications of a similar nature. There has clearly been no departure from the accepted and usual course of judicial proceedings.

POINT III.

THE PETITIONER IS GUILTY OF LACHES, AND THE COURT PROPERLY FOUND THAT HER DELAY IN MAKING HER APPLICATION WAS NOT ADEQUATELY EXPLAINED.

For three full years after Judge Manton's widely publicized conviction, petitioner made no move to reopen the case. Her only explanation for this delay is given as fol-

lows: "The petitioner is the sister of the attorney herein and during her very long and serious illness he was prevented in many ways from giving his attention to this case" (Brief in support of Petition, p. 15).

Petitioner offers no explanation why it was necessary for her attorney, who is also her brother, to wait until there was hope for her recovery and improvement before the petition for reopening the appeal could be made, or why it was necessary to have petitioner's personal participation in such application. Certainly the petitioner's attorney, who has been in charge of this case from its inception in 1931, was in a position to move for a reopening within a short time after Judge Manton's conviction in 1939. In fact, all of the affidavits in support of the application for reopening made before the Circuit Court of Appeals were signed by him.

POINT IV.

PETITIONER HAVING FAILED TO FILE A CLAIM IN THE PARAMOUNT REORGANIZATION PROCEEDINGS MAY NOW ASSERT NO FURTHER CLAIM. SHE IS ENJOINED BY ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK FROM PROCEEDING IN THIS ACTION.

By various orders of the District Court for the Southern District of New York, all claims in the Reorganization Proceedings of the respondent Paramount were required to be filed prior to June 17, 1935 (Record, p. 30). It is uncontradicted that no claim was filed by the petitioner in the Reorganization Proceedings. She is therefore barred from now asserting any claim against the respondent Paramount.

Judge Coxe's order (to which the petitioner refers in her brief) entered in the Paramount receivership proceeding authorizing her to continue this action to final judgment, did not relieve the petitioner of the necessity of filing a claim based on such judgment in the subsequent Reorganization Proceedings. Said order obviously merely permitted the petitioner to liquidate her claim in the pending action rather than in the receivership proceedings. A judgment in the action in favor of the petitioner would merely have conferred upon the petitioner the status of a creditor whose claim was liquidated. But like all other creditors she was required by the various orders of the court in the Reorganization Proceedings to file her claim by a certain date or be barred from making any recovery thereon. Her failure to file such a claim barred her from participation in the Plan of Reorganization of Paramount and from asserting any claim thereafter against the estate.

Moreover, by order of the District Court of the Southern District of New York dated June 16, 1934, all creditors were enjoined from commencing or continuing any suits against Paramount. This order was further continued by an order of June 17, 1935, pursuant to which all of the assets of Paramount were turned over to it by the Trustees (Record, pp. 29-30). This injunction remains in full force and effect and bars the petitioner from proceeding further against the respondent Paramount.

WHEREFORE, it is respectfully submitted that the petition for *Writ of Certiorari* be denied, with costs.

AUSTIN C. KEOUGH,
Attorney for Respondent Paramount.

LOUIS PHILLIPS,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 294

MYRA PAGE WIREN,

Petitioner,

against

SHUBERT THEATRE CORPORATION, ET AL.,

Respondents.

Brief for Respondent Shubert Theatre Corporation, Shubert Theatrical Company and Lee Shubert in Opposition to Petition for Writ of Certiorari

WILLIAM KLEIN,
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MILTON R. WEINBERGER,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

MYRA PAGE WIREN,
Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,
Respondents.

Brief for Respondent Shubert Theatre Corporation, Shubert Theatrical Company and Lee Shubert in Opposition to Petition for Writ of Certiorari

Statement of Facts

This is a petition from a decision of the United States Circuit Court of Appeals, Second Circuit dated May 13, 1942 denying petitioner's motion to vacate the decree of that Court dated May 21, 1934 affirming a decree of the District Court, Southern District of New York on the ground that Judge Martin T. Manton who presided in the Circuit Court was disqualified.

On October 31, 1933 Judge Henry W. Goddard, at the District Court, Southern District of New York, signed a judgment dismissing the complaint as to all defendants on the merits (R. pp. 5, 17; 5 Fed. Supp. 358). The com-

plaint sought to enjoin the defendants from presenting upon the stage or by means of motion pictures the play "Death Takes A Holiday" upon the ground that the said play was a plagiarism of petitioner's work "Most". The opinion of Judge Goddard speaks for itself. It reflects an amount of careful and painstaking research and indicates a close consideration not only of the respective works but also of the prevailing authorities. Judge Goddard gave ample reasons for dismissing the complaint.

The said judgment was affirmed by the Circuit Court of Appeals on May 21, 1934. Judges Martin T. Manton, Thomas W. Swan and Harrie B. Chase heard and decided the appeal (R. pp. 5, 17).

The United States Supreme Court on October 8, 1934 denied plaintiff's application for a writ of certiorari (R. p. 17; 293 U. S. 591). A rehearing was denied on November 5, 1934 (R. p. 17; 293 U. S. 631).

The Circuit Court of Appeals which denied plaintiff's motion for a vacatur of the judgment of affirmance of May 21, 1934 consisted of Thomas W. Swan as Presiding Judge and Judges Charles E. Clark and Jerome F. Frank (R. p. 3).

Petitioner sought to link defendant Paramount, who produced the motion picture version of "Death Takes A Holiday", with Judge Manton through one Albert D. Lasker, it being charged that Lasker, a member of the Board of Directors of Paramount, made a loan of $250,000 to Judge Manton (R. p. 5). Lasker was a member of said Board from November 9, 1931 to January 17, 1933, eight months before the case was decided by Judge Goddard, and sixteen months before the affirmance by the Circuit Court of Appeals (R. p. 25). During the period of litigation Lasker owned but 33 shares out of 3,000,000 shares of

common stock of Paramount (R. p. 2). Lord & Thomas, an advertising agency which represented Paramount, and which Lasker allegedly owned (R. p. 5), did not own any stock of Paramount (R. p. 50). During the time of the appeal, Paramount was in the hands of reorganization trustees (R. pp. 29, 2). The amplification of these facts we leave for Paramount's counsel.

With respect to the Shubert respondents, who were engaged in presenting plays upon the stage, no charge is made that they had any dealings directly or indirectly with Judge Manton. The nebulous and vague charges are made, apparently for whatever they might be worth, that $25,000 was paid to him in connection with certain Cinema Patent Co. Inc. litigation by one Robert Newman "a man in the theatrical business"; and that one William J. Fallon, who allegedly made arrangements for Judge Manton, was the owner of a large theatre ticket concern (R. p. 7). The Shuberts categorically deny that there was any connection between them and Newman or Fallon relating to this case, and emphatically state that they had no dealings, directly or indirectly with Judge Manton (R. pp. 55-56).

Judge Manton was indicted in April 1939; his judicial misconduct had been referred to in the press for fully a year prior thereto; he was tried and convicted on June 3, 1939 and his conviction affirmed the same year (R. p. 56). Yet plaintiff did nothing for three years, giving as the only reason that her counsel, who is her brother, because of her illness was prevented "in many ways" from giving his attention to the case (R. p. 4).

Summary of Respondents' Argument

I. Petitioner has not complied with Rule 12 of the Rules of the United States Supreme Court.

II. The disqualification of Judge Manton was not established.

III. Petitioner is guilty of laches.

POINT I

Petitioner has failed to comply with Rule 12 of the rules of this Court, and this petition should therefore be dismissed.

POINT II

The disqualification of Judge Manton was not established.

The interest, requisite for disqualification, must be real, certain, not merely possible or contingent, it must be demonstrable and capable of precise proof (*People* v. *Whitbridge,* 144 App. Div. 493). The innuendo that the Shuberts were connected with Judge Manton because the latter had dealings with Newman who was "in the theatrical business" and Fallon who was "acquainted with people in the theatre industry" does not satisfy that test, but is no more than rumor or gossip. This is not sufficient upon which to base disqualification (*Berger* v. *United States,* 255 U. S. 22).

Nor is mere interest alone sufficient. The interest must have some relation to the particular litigation (*In re Honolulu Cons. Oil Co.*, 243 Fed. 348), or as the Circuit Court of Appeals said, in denying plaintiff's motion, "the disqualification must be directly connected with the very case on appeal" (R. p. 2). Neither Lasker, Newman or Fallon were parties to the action. No claim was made that Newman or Fallon were stockholders or in any way connected with any of the respondents. Lasker's sole relation was as the owner of 33 shares, out of 3,000,000 shares, of the common stock of respondent Paramount. At that time Paramount was in reorganization. The Shubert corporations were in equity receivership. Lasker's interest was too remote and indirect to disqualify Judge Manton (*Long* v. *Stites*, 63 Fed. 2nd 855, certiorari denied 290 U. S. 640).

POINT III

Petitioner is Guilty of Laches.

Petitioner did nothing for three years after Judge Manton's misconduct became public knowledge. The challenge must be made at the first opportunity after discovery of the facts (*Chaflin* v. *U. S.*, 5 Fed. 2nd 592, certiorari denied 269 U. S. 552; *Borough of Hasbrouck, N. J.* v. *Agrios*, 10 Fed. Supp. 371). Petitioner does not deny that for several years she had knowledge of the facts upon which she relies, but feebly attempts to explain her delay upon the conclusory claim of illness. Suffice it to say that the Circuit Court of Appeals found the delay "not adequately explained" (R. p. 2).

The respondents therefore respectfully submit that the petition for a writ of certiorari should be denied, with costs.

Dated, New York, New York, September 4, 1942.

Respectfully submitted,

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MILTON R. WEINBERGER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 294

MYRA PAGE WIREN,

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against

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Respondents.

REPLY BRIEF FOR PETITIONER.

OSCAR B. WIREN,
Attorney for Petitioner.

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IN THE

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No. 294

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REPLY BRIEF FOR PETITIONER

Because of incorrect statements as to the facts and inapplicable references to law in the briefs of respondents, this reply brief is necessary.

1

With respect to the connection of Mr. Albert D. Lasker with respondent Paramount, and the disqualification of Judge Manton.

Counsel for the respondents Shubert states that Mr. Lasker's sole relation to Paramount was "as the owner of a few shares of common stock of Paramount", and respondent Paramount quotes the Circuit Court of Appeals' statement that "Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton".

It is admitted by Paramount that during the entire period in question and for several years thereafter, Mr. Lasker had the handling of all of the advertising business of the gigantic Paramount Corporation with its numerous

large subsidiary corporations of various kinds (R. p. 25); it is not denied that his great chain of Chicago theatres had been taken over and incorporated into Paramount (R. fol. 20); he had been made a director of Paramount and continued as such until January 17, 1933 (R. p. 32), just before the institution of the bankruptcy proceedings of the company on March 14, 1933 (R. p. 29); the New York Times financial sheet reported that Mr. Lasker, in company with Mr. Hertz, who also was a director of Paramount and Mr. Lasker's business associate, was buying heavily into Paramount (R. fol. 20).

With respect to the so-called 33 shares, petitioner claims on information that Mr. Lasker held a great deal of the stock of Paramount in the names of nominees or associates, just as his loan of $250,000 to Judge Manton was not in his own name but in the name of one of his companies, and Paramount admits that it has refused to allow petitioner to examine its stock lists (R. p. 50), the very lists from which they say that they obtained their information, although there could be no reason for their refusal if it were not that such an examination would disclose stock held by Mr. Lasker in the names of nominees or associates.

It is submitted that the 33 shares, referred to in the briefs of respondents Shubert and Paramount, were not by any means Mr. Lasker's only relationship with Paramount, and that his connection with and interest in Paramount was very far from remote.

When a man in Mr. Lasker's connection with Paramount and as deeply interested in the Corporation and its subsidiary corporations as Mr. Lasker, loaned a quarter of a million dollars to Judge Manton and pressed Judge Manton for payment at the very time that this case against Paramount was pending before Judge Manton, as testified to by Mr. Lasker, (R. p. 5) and Judge Manton was unable to pay it, as was testified (R. p. 5) and then Judge Manton decided this case, involving one of the most successful plays

and a motion picture which made a profit of several million dollars, in favor of Paramount, and thereafter Judge Manton was not pressed for payment, as was testified to (R. p. 5), and Judge Manton has never paid any part of it or any interest thereon, (R. p. 5) and did not list it among his debts (R. p. 5); it is submitted that the financial consideration which Judge Manton thereby received was just as "real, certain, demonstrable and capable of concise proof" as though the evidence were that Judge Manton was paid cash for his decision and that as said by this Court in *Berger* v. *United States*, 255 U. S. 22, "he had no right or power to preside as judge".

The cases cited under Point II of the brief of respondents Shubert, as bearing upon the question of disqualification and as to when such disqualification should be challenged, do not support his contention. Those cases deal with the situation provided for under section 21 of the Judicial Code which provided for the filing of an affidavit before trial with the judge who is to preside at the trial. In *People* vs. *Whitbridge as Receiver*, 144 App. Div. 493, an affidavit was filed with the judge at the time of the trial citing his ownership of stock in the Union Railway Company of New York, which was in receivership. The court held that the action was against the receiver and not against the railway company, saying "Although Mr. Whitbridge is sued as receiver, it is manifest that the acts or omissions for which it is sought to recover penalties were his personal acts or omissions, and not those of the railway company, and if judgment had gone against him, it would have been one against him personally and not one against him *as* receiver or against the corporation." Furthermore, counsel for Shubert has not fully quoted the court in saying that the court said merely "the interest requisite for disqualification must be real", because what the court said was: "The interest which will disqualify a judge to sit in a cause *need not be large*" (italics ours) "but it must be real".

In *Berger* v. *United States* (supra), cited by counsel for Shubert the affidavit filed under Section 21 of the Judicial Code charged Judge Landis, who was to preside at the trial, with bias and prejudice, stating that Judge Landis had made remarks concerning the defendants who had been indicted, and Mr. Justice McKenna held that the affidavit of prejudice was sufficient to invoke the operation of the act and that Judge Landis had a lawful right to pass upon the sufficiency of the affidavit, but that he had no right or power to preside as judge on the trial of defendants.

In re Honolulu Cons. Oil Co., 243 Fed. 348, the judge held a little stock in two of the many oil companies which were being sued by the United States for an accounting. He disqualified himself voluntarily on three occasions and then sold the stock for $16.90 and felt that thereafter he was not disqualified; but the Court held that in view of the fact that he had certain stockholder's liabilities, he was "sufficiently related to the litigation to impel the conclusion that he is concerned in interests and therefore should not sit," and a writ of mandamus was issued.

Long v. *Stites*, 63 Fed. (2nd) 855, was a suit by stockholders for maladministration against trustees under a trust agreement by which the National Bank of Kentucky and the Louisville Trust Company had been combined and the trustees had promoted a new bank called "The Banco Kentucky," and plaintiffs charged them with maladministration. On the trial the plaintiffs asked the district judge to disqualify himself upon the ground that he and his wife were depositors (in amounts not shown) in the National Bank of Kentucky. The court said, on page 858: "Neither the bank nor its receiver were parties, and the plaintiffs' action involved no issues as between either of them and the plaintiffs". Petitioner submits that this case is not at all in point with the present case.

2

As to the argument of respondents and the statement of the Circuit Court of Appeals in its decision on this motion about Paramount being in reorganization during a part of the period in question, the facts are as follows:

The large investment of Paramount in the purchase of the talking motion picture rights to the play and the preparations to produce the picture (R. pp. 18-25) were prior to the filing of Paramount's voluntary petition in bankruptcy in March, 1933 (R. p. 29). The production of the picture was held up (R. pp. 19-23) until the decision of the District Court dismissing the case without a trial in August, 1933 (R. p. 17) but the production of the picture was completed at a cost of half a million (R. p. 23) prior to the decision of Judge Manton on May 21, 1934, and prior to the filing by Paramount of its petition for a reorganization on June 7, 1934, the picture being released in the United States in the spring of 1934 (R. p. 24). The Closing Time of the reorganization when the Trustees turned back the assets to the debtor was July 1, 1935 (R. p. 30). The picture was exhibited thereafter throughout the United States and Europe for several years making profits of several million dollars.

Mr. Lasker was a director of Paramount from 1931 to just before the filing of the voluntary petition in bankruptcy in 1933 (R. p. 38) and handled all of the advertising business of Paramount and its many subsidiary corporations continuously from 1932 to 1937 (R. p. 25).

Thus it is not true, as the respondents would have the Court believe, that the Trustees were in charge throughout the period in question. The fact is that the greater part of the investment by Paramount and practically all of the earnings on the picture took place when the Trustees

were not in charge and that they took place while Mr. Lasker was so connected with and deeply interested financially in the affairs of Paramount.

3

With respect to Point II of the brief of respondent Paramount, contending that there is no important question of federal law involved, and that the Circuit Court of Appeals has not departed from the accepted course of judicial proceedings.

It is submitted that the question as to what constitutes the disqualification of the presiding judge of a United States Circuit Court of Appeals is a question of federal law and one of great importance.

With respect to the second part of the point, which contends that the Circuit Court of Appeals has not departed from the accepted course of judicial proceedings, it has been held, *even in many cases where there was merely technical disqualification and there had been no actual corrupt participation in the decision,* that no decree was rendered by a duly constituted and completely disinterested court and that, in legal effect, no hearing was had by the plaintiff, and that therefore the decrees were void and a nullity. (See *Case* v. *Hoffman,* 100 Wis. 314; *People* v. *Connor,* 142 N. Y. 130; *Duryea* v. *Traphagen,* 84 N. Y. 652; *Seaward* v. *Tasker,* 143 N. Y. S. 257; *Davis* v. *Seaward,* 85 Misc. 210, affd. 171 A. D. 963; *Regina* v. *Henley* (1892) 1 Q. B. 504; *Reg.* v. *Justices of Hertfordshire* (1845) 6 Q. B. 753; *Reg.* v. *Cheltenham* (1841) 1 Q. B. 467).

4

With respect to the statement of counsel for respondents Shubert, in Point I of his brief, that petitioner has failed to comply with Rule 12 of this Court.

Rule 12 deals solely with appeals by application to and allowance by a justice and not to a petition for certiorari. Counsel for respondent treats it as though the amendments of the act of Congress of 1928 abolishing the writ of error and extending the right of appeal in equity cases included a proceeding of this kind.

5

With respect to respondents' contention that petitioner is guilty of laches.

Petitioner submits that the affidavits submitted by her counsel and set forth in the record show that she was practically at death's door with heart disease during all of that time and that even up to last Fall, she was very seriously ill and that her illness required the attention of her brother, who is her counsel, and that he could not bring these proceedings sooner. (R. pp. 3, 4, 46). Counsel for respondent Shubert makes the statement that Judge Manton's judicial conduct had been referred to in the press prior to his indictment. Surely counsel does not mean to urge that proceedings should have been taken upon such mere rumors.

The case of *Chafin* v. *U. S.*, 5 Fed. (2nd) 592, cited by the counsel for Shuberts, in support of his statement that "the challenge must be made at the first opportunity after the discovery of the facts," is not in point as it deals with an affidavit filed under Section 21 of the Judicial Code,

after indictment and before trial, and the court merely construed the terms of that section which provide that when the indictment is found 10 days before the term begins the affidavit must be filed ten days before the beginning of the term, or good cause shown, for "the public protection against unnecessary surprise, delay and expense": also the case of *Borough of Hasbrouck, N. J.* v. *Agrios,* 10 Fed. Supp. 371 cited by counsel for Shuberts on this is not in point. It was a suit to recover damages for breach of contract to build a sewer, and the court said: "The proper time to bring the facts concerning disqualification before the judge is as early in the action as the objecting party has knowledge of the facts."

Counsel for respondent Shubert quotes the Circuit Court of Appeals as saying in its decision on this motion that the delay is "not adequately explained", whereas what the Circuit Court of Appeals said is: "The delay in making this motion is not adequately explained. *But assuming that this defect could be cured by a further affidavit*" (R. p. 2), showing, as petitioner submits, that the Circuit Court considered that the delay could be explained and waived.

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With respect to the contention of respondent Paramount that petitioner is enjoined.

When the attorney for Paramount raised this point on the hearing of the motion, petitioner submitted a copy of the order of Judge Coxe in the Paramount proceedings modifying the restraining order and providing that petitioner's action should "*continue to final* judgment" (R. p. 47), and a similar order by Judge Caffey in the Shubert bankruptcy proceedings (R. p. 47).

The order of June 16, 1934, mentioned by Paramount, was issued *after* the decision of Judge Manton on May 21, 1934.

The decision of the Circuit Court of Appeals on this motion does not mention this contention of Paramount and no similar contention is made on the part of the Shuberts, although similar orders were signed in that proceeding, but counsel for Paramount claims that petitioner should have filed a claim prior to June 17, 1935.

It is submitted that Judge Manton dismissed the appeal of petitioner on May 21, 1934 and petitioner's application to this court for a writ of certiorari was finally denied on November 5, 1934, and it is submitted that petitioner could not file a claim. There was no intimation at that time by anyone that Judge Manton was guilty of judicial misconduct, and what petitioner seeks here is the vacation of the decree of the Circuit Court of Appeals of May 21, 1934, and the restoration of the case to its status prior to that date.

With respect to the respondents' statements as to the facts of the plagiarism suit.

On the hearing of this motion in the Circuit Court of Appeals respondents insisted upon arguing the facts of the plagiarism suit, counsel for Paramount serving a 34 page affidavit dealing very largely with those facts, and because of that petitioner submitted the story of the two plays told as one, showing the complete identity of the three acts of the two plays from beginning to end, contained in the record.

It is submitted that the facts concerning the plagiarism suit did not pertain to this motion in the Circuit Court of Appeals and that the only issue was whether Judge Manton was disqualified.

All that petitioner is asking is an opportunity to present her appeal to a disinterested Court in order to show that the decision of the District Court was entirely contrary

to the facts of the case and to the law on all of the questions involved and be allowed a trial of her case which she has been trying to get for twelve years but thus far has been denied, whereby a great injustice was committed.

WHEREFORE petitioner respectfully asks that her petition be granted.

MYRA PAGE WIREN,
By OSCAR B. WIREN,
Attorney for Petitioner.

No. 294

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MYRA PAGE WIREN,

Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,

Respondents.

BRIEF FOR RESPONDENT PARAMOUNT PICTURES INC. IN OPPOSITION TO PETITION FOR REHEARING

AUSTIN C. KEOUGH,
Attorney for Respondent,
Paramount Pictures Inc.

LOUIS PHILLIPS,
Of Counsel.

IN THE

Supreme Court of the United States

MYRA PAGE WIREN,
Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,
Respondents.

BRIEF FOR RESPONDENT PARAMOUNT PICTURES INC. IN OPPOSITION TO PETITION FOR REHEARING

On October 8, 1934, this Court denied the petitioner's application for writ of certiorari seeking a review of the unanimous affirmance by the Circuit Court of Appeals for the Second Circuit of the dismissal of this action (293 U. S. 591).

On November 5, 1934, a petition for rehearing was similarly denied (293 U. S. 631).

On October 12, 1942, this Court denied a petition for writ of certiorari which sought a review of the decision by the Circuit Court of Appeals for the Second Circuit, denying the petitioner's application for reargument of the appeal originally decided by that Court on May 21, 1934, upon the grounds of alleged disqualification of Judge Manton.

This litigation seems to be without end. The petitioner now asks for a rehearing.

The petition for rehearing merely restates in summary the grounds urged in the petition for writ of certiorari. No new grounds are stated.

In these circumstances we have no further facts or arguments to urge other than those set forth in our papers in opposition to the petition for writ of certiorari, and ask that this petition for rehearing be denied.

WHEREFORE, it is respectfully submitted that the petition for rehearing be denied, with costs.

AUSTIN C. KEOUGH,
Attorney for Respondent,
Paramount Pictures Inc.

LOUIS PHILLIPS,
Of Counsel.



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MYRA PAGE WIREN,

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PETITION FOR REHEARING

OSCAR B. WIREN,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

MYRA PAGE WIREN, *Petitioner,* *against* SHUBERT THEATRE CORPORATION, *et al.,* *Respondents.*	No. 294

PETITION FOR REHEARING

The above named petitioner, Myra Page Wiren, presents this petition for rehearing in the above entitled cause, and in support thereof shows:

The application for a writ of certiorari, filed August 14, 1942, was denied October 12, 1942.

As reasons why a rehearing in this cause should be granted, petitioner begs leave to state the essential grounds for her contention:

On the trial of Judge Manton the jury and trial judge held that the evidence that the President and owner of Lord & Thomas made a loan of $250,000 to Judge Manton while the case of a client of Lord & Thomas, namely the American Tobacco Company, was before Judge Manton, was evidence upon which to *convict* him (R. pp. 42, 5).

In the present case the defendant Paramount was not only an *equally important* client of Lord & Thomas (R. pp. 42, 25) but furthermore the said President and owner of

Lord & Thomas who made the loan to Judge Manton *was very deeply interested financially in Paramount* (R. fol. 20) and the said President and owner of Lord & Thomas was *pressing Judge Manton for payment of said $250,000 at the very time that this case against Paramount was before Judge Manton and decided by him* (R. p. 5) and the *$250,000 has never been paid nor any interest thereon* (R. p. 5) and *was not listed by Judge Manton among his debts when examined under oath shortly after his decision in this case* (R. p. 5), *at which time he testified that all of his debts had been paid (and did not mention this $250,000) and that he was worth a half million dollars net.*

Petitioner feels that this Honorable Court does not mean to hold that although such evidence was accepted on Judge Manton's trial as proof of corruption on his part, nevertheless in *this* case it is *"too remote"* on which to *merely grant a rehearing* of the case which Judge Manton decided.

Chief Justice Fuller said in the case of *Lau Ow Bew, Petitioner,* 141 U. S. 583, 587, that the inquiry upon such an application as this is "whether the matter is of sufficient importance in itself and sufficiently open to controversy" to justify the writ. Petitioner feels that this Honorable Court does not mean to hold that the question as to whether the Presiding Judge of The Circuit Court of Appeals was disqualified when he decided this case involving several million dollars brought by an American author in regard to her literary life work against a gigantic corporation and theatrical producers who plead that they got the play from an Italian, native and resident of Milan, Italy, is not of sufficient importance and is not sufficiently open to controversy to warrant the exercise of this Honorable Court's power of review.

It is respectfully urged that the gravity of the situation requires the reconsideration of this important question by this Court.

Wherefore, it is respectfully asked that this petition for rehearing be granted, and that the judgment of this Court

denying the application of the petitioner for certiorari be, upon further consideration, set aside and that the petition for certiorari be granted.

Respectfully submitted,

OSCAR B. WIREN,
Counsel for Petitioner.

I, OSCAR B. WIREN, attorney for the above named petitioner, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith.

OSCAR B. WIREN.